APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

1886 *July* 30.

KALA CHARA TEA CO., LD. (PLAINTIFFS) *v.* SUKUL SINGH AND OTHERS (DEFENDANTS).*

Boundary dispute—Possession, Evidence of—Bengal Act V of 1875, *ss.* 40, 41, 59, 60, 62—*Suit based on Title.*

A formal decision on the question of boundary in a boundary dispute under s. 62 of Bengal Act V of 1875, although conclusive as to possession, is no bar to a suit based upon title.

THIS was a suit brought to recover *khas* possession of six kedars of land held by the plaintiffs under certain settlement pottahs; the plaintiffs stated that they had been dispossessed in 1289 B. S. (1882), and had thereupon brought a suit under s. 9 of the Specific Relief Act for possession, that that suit was dismissed on the 4th September 1882, and that they brought the present suit for the purpose above mentioned on the 8th September 1884.

The defendants contended that the boundaries of the land given by the plaintiff Company were incorrect; that at the recent settlement these lands had been leased out to them under a pottah, and the boundaries laid, and the land had been held by them for more than 12 years.

The Assistant Commissioner, who was also Sudder Munsiff, found that the boundaries given in the plaint were correct; that on reference to the map made by the Civil Court Ameen, and to the measurements made by him, the land belonged to the plaintiffs' pottah, but that according to the recent survey it appeared that the land had been included in the defendant's pottah; but after taking into consideration the evidence given by the plaintiff Company, he held that the land belonged to the plaintiff Company; he therefore gave them a decree.

The defendants appealed to the Deputy Commissioner of Cachar, who held that the suit was barred under s. 62 of Bengal

* Appeal from Appellate Decree No. 2181 of 1885, against the decree of J. Kennedy, Esq., Deputy Commissioner of Cachar, dated the 11th of July 1885, reversing the decree of Baboo Nritya Gopal Chatterjee, Munsiff of Cachar, dated the 27th of January 1885.

Act V of 1875, inasmuch as no appeal under ss. 59 or 60 of that Act had been made against the order fixing the boundary of the mehals; he therefore allowed the appeal.

The plaintiff Company appealed to the High Court.

Mr. *O'Kinealy* (with him Mr. *Macnair*) for the appellants contended that the suit should not have been treated as a suit to set aside an order deciding a boundary dispute under Bengal Act V of 1875, and that s. 62 of that Act did not apply; that there had been no boundary dispute to which the plaintiffs had been parties; and that no issue having been raised as to the alleged boundary dispute, and no ground of appeal as to the application of the said Act having been preferred against the judgment of the Munsiff, the Sub-Judge was not justified in assuming that an order adverse to the plaintiffs had been come to under the Act.

Baboo *Aukhil Chunder Sen* for the respondents.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

This is a suit brought to recover certain lands which, the plaintiffs say, were included in the pottah or pottahs under which they held their property from the Government, and from which they say they have been dispossessed by the defendants.

A number of issues were raised, and the Munsiff disposed of those issues in such a manner as to entitle the plaintiffs to the decree they asked for.

On appeal, the Deputy Commissioner of Cachar has reversed that decision on one ground. He says, with reference to a survey which had been made apparently about the year 1881 or just previously, "the laying of the boundary mehals during the recent settlement was not appealed apparently either under s. 59 or s. 60 of Bengal Act V of 1875, and therefore under s. 62 of the same Act the present suit is barred." It has been argued that the dispute has been going on for a long time, and that legal proceedings were entered into regarding the matter previous to the laying of the boundary, but that does not appear to me to make any difference. The present suit admittedly was brought after the relaying of the boundary by the Settlement Officers,

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and it is to the date only of the present suit that I can look." He has therefore held that the proceeding of the Settlement Officers under Bengal Act V of 1875 was by s. 62 of that Act conclusive.

Now, s. 62 refers to an order deciding a boundary dispute. Boundary disputes are dealt with in the fifth part of the Act. Section 40 says: "If it shall come to the notice of the Collector, in the course of a survey under this Act, that a dispute exists as to any boundary which should be surveyed, the Collector, after holding such inquiry as he may deem necessary, may determine such boundary as hereinafter provided." That clearly contemplates that there shall be a dispute between certain parties, that there shall be a proceeding between those parties in which they shall have an opportunity of stating and establishing their several claims, and in which the Collector is to decide the boundary as between the parties. The nature of the decision and the matter to be decided are stated in the next section. Section 41 says, that "the Collector shall determine the boundary according to actual possession, and cause it to be secured by boundary marks, and the order of the Collector under this section shall, until it be reversed or modified by competent authority, have the force of an order of any Civil Court, declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector." Therefore what the Collector is to determine, in a proper proceeding, is the fact of possession, and he is to lay down the boundary line according to actual possession. He is not to inquire, and has no jurisdiction to inquire, as to any question of right or title. Sections 59 and 60 give appeals to certain superior revenue authorities, and then comes s. 62, which says: "No suit shall be brought to set aside an order of a Superintendent of Survey, Collector, Assistant Superintendent, or Deputy Collector deciding a boundary dispute, unless an appeal shall have been first preferred under s. 59 or s. 60, or unless the person suing was at the time when such order was passed a minor, or insane, or an idiot." In the present case there is not shown to have been any boundary dispute between the present parties to this suit. There is not shown to have been any proceeding before a

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Revenue Officer to which these persons were parties, or in which they were represented. Therefore there was nothing in existence which could enable the Revenue Officer to decide a question of boundary between them under s. 40. Further, if there had been such proceeding before the Revenue Officer, and if he had decided anything he would have decided the fact of possession, and his order would operate only as to the fact of possession. And as the only thing as to which a suit is forbidden by s. 62 is the setting aside of an order deciding a boundary dispute, it follows that if there had been the most regular proceeding and the most formal decision on the question of boundary in a boundary dispute, though that would have been conclusive as to possession, under s. 62 it would have been no bar to a suit based upon title.

For these reasons we think that the decision of the lower Appellate Court cannot be supported, and must be set aside.

The Deputy Commissioner has not dealt with the other issues arising in this suit in a way which appears to us sufficient to enable us to dispose of the case. It is necessary therefore that the case should go back to him in order that he may decide those issues.

The appellant will have his costs of this appeal.

T. A. P. *Appeal allowed and case remanded.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

CHUNDER COOMAR ROY AND OTHERS (DECREE-HOLDERS) *v.* GONESH CHUNDER DASS AND OTHERS (JUDGMENT-DEBTORS).*

1886 *June* 8.

—Possession, Suit for—Mesne profits—Decree silent as to mesne profits—Power of Court executing Decree—Hindu Law—Daughters' sons—Representatives—Reversioners, Liability of for acts of widow.

Plaintiff sued for possession of certain lands and for mesne profits. He obtained a decree for possession, but the decree was silent as to mesne profits. *Held*, that the Court executing the decree was not competent to entertain a claim for mesne profits made by the decree-holder.

A Hindu, governed by the Bengal School of Hindu law, brought a suit for possession of a certain taluk, but died before decree, leaving him surviving a

*Appeal from Order No. 344 of 1885, against the order of Baboo Rakhal Chunder Bose, Roy Bahadur, Subordinate Judge of Furreedpore, dated the 15th of June, and amended on the 24th of September 1885.